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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PETER SMITH and FRANÇOISE SMITH, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant.	No. 1:12-CV-01282-MV-LFG **NOTICE OF DISMISSAL WITHOUT PREJUDICE**

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Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), Plaintiffs Peter and Françoise Smith hereby voluntarily dismiss their lawsuit against the United States Army Corps of Engineers.

On December 11, 2012, Plaintiffs filed a complaint for declaratory and injunctive relief under the Administrative Procedure Act, challenging the Corps' designation of a dry creek bed on their property as a "water of the United States" subject to regulatory control under the Clean Water Act, 33 U.S.C. § 1251, *et seq*. The complaint alleged that the Corps had issued an unlawful Approved Jurisdictional Determination (JD) in which it premised the exercise of jurisdiction on the existence of a "significant nexus" between the dry creek bed (the "Gallina Arroyo") and the Rio Grande 25 miles away. This JD was arbitrary and capricious, contrary to law and unsupported by substantial evidence because the creek bed did not contain any "relatively permanent, standing or continuously flowing bod[y] of water" so as to satisfy Justice Scalia's test for jurisdiction in *Rapanos v. United States*, 547 U.S. 715, 739 (plurality opinion). The complaint alleged, in the alternative, that assuming Justice Kennedy's concurring opinion in *Rapanos* articulated a valid jurisdictional test, 547 U.S. at 759 (Kennedy, J., concurring in the judgment), the JD failed to satisfy that test because it did not demonstrate, either quantitatively or qualitatively, how the Plaintiffs' dry creek bed affected the physical, biological and chemical integrity of the Rio Grande.

On February 12, 2013, Plaintiffs' counsel learned from counsel for the Corps that the Corps had reevaluated its position on jurisdiction and that it no longer maintained that the creek bed was a jurisdictional waterbody. Plaintiffs' counsel received on February 13, 2013, a copy of a revised JD and accompanying letter which the Corps sent to Plaintiffs. *See* Exhibit A. This revised JD concluded: "Based upon the lack of evidence in the record of a physical, chemical or biological connection, a significant nexus with the TNW [Traditional Navigable Water] Rio Grande cannot be identified and the Gallina Arroyo is determined to be non-jurisdictional under Section 404 of the Clean Water Act."

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As the Plaintiffs' lawsuit was premised on the Corps' assertion of jurisdiction over their property—and the Corps no longer asserts that jurisdiction—the Plaintiffs' claims are moot. Plaintiffs therefore voluntarily dismiss their lawsuit. This dismissal is without prejudice in accordance with Federal Rule of Civil Procedure 41(a)(1)(B).

DATED: March 8, 2012.

Respectfully submitted,

LEE E. PETERS
DAMIEN M. SCHIFF
JENNIFER M. FRY

By ______________________
JENNIFER M. FRY

Attorneys for Plaintiffs

EXHIBIT - A

DEPARTMENT OF THE ARMY
ALBUQUERQUE DISTRICT, CORPS OF ENGINEERS
4101 JEFFERSON PLAZA NE
ALBUQUERQUE, NM 87109-3435

REPLY TO
ATTENTION OF

February 13, 2013

Regulatory Division

SUBJECT: REVISED APPROVED JURISDICTIONAL DETERMINATION; Action Number SPA-2011-00244-ABQ, P. Smith, Gallina Arroyo, Santa Fe County, NM

Mr. Peter Smith
64 Coyote Trail
Santa Fe, New Mexico 87508-8631

Dear Mr. Smith:

The purpose of this letter is to inform you that the Albuquerque District Corps of Engineers has reevaluated its Approved Jurisdictional Determination (AJD) dated June 5, 2011, Action Number SPA-2011-00244-ABQ. A copy of the revised AJD is attached. This AJD supersedes any and all prior jurisdictional determinations made regarding the subject action.

In accordance with 33 CFR 331.2 and Regulatory Guidance Letter 05-02, jurisdictional determinations may be reevaluated prior to their expiration date when new information warrants revision. In November 2012, an AJD prepared for another site, the Calabacillas Arroyo (Bernalillo County, NM), was remanded to the Albuquerque District following an administrative appeal decision. Although the Calabacillas Arroyo AJD and the Gallina Arroyo AJD involve entirely different sites, the Calabacillas appeal decision provided new information that contributed to the Corps' decision to reevaluate the Gallina Arroyo AJD. A more complete discussion is provided in the attached document.

The Corps has determined that there are no waters of the United States on your property. The basis for this determination is set forth in the attached AJD, and includes the conclusion that the Gallina Arroyo on your property does not have a significant nexus to traditionally navigable waters. The revised AJD that reflects this determination is valid for a period of five years from the date of the AJD unless new information warrants revision before the expiration date.

You may accept or appeal this AJD or provide new information in accordance with the Notification of Administration Appeal Options and Process and Request for Appeal form. A copy of the form is enclosed and it is also available at:
http://www.spa.usace.army.mil/reg/Administrative%20Appeals/appeals_process.asp.
If you elect to appeal this AJD, you must complete Section II (Request For Appeal or Objections to an Initial Proffered Permit) of the form and return it to the Army Engineer Division, South

Pacific, CESPD-PDS-O, Attn: Tom Cavanaugh, Administrative Appeal Review Officer, 1455 Market Street, Room 1760, San Francisco, CA 94103-1399 within 60 days of the date of this notice. Failure to notify the Corps within 60 days of the date of this notice means that you accept the AJD in its entirety and waive all rights to appeal the AJD.

If you have any questions concerning our regulatory program, please contact me at the address above, or by phone at 505-342-3678, or by e-mail at Marcy.L.Leavitt@usace.army.mil.

Sincerely,

Marcy Leavitt
NM-TX Branch Chief

Enclosure

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): February 11, 2013

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: Albuquerque District, P. Smith, Unauthorized Channel Work, Gallina Arroyo, Santa Fe County, NM, SPA-2011-00244-ABQ

C. PROJECT LOCATION AND BACKGROUND INFORMATION:
State: New Mexico County/parish/borough: Santa Fe City: Santa Fe
Center coordinates of site (lat/long in degree decimal format): Lat. 35.474532° N, Long. -106.075619° W.
Universal Transverse Mercator: 13: 402416.11E; 3926200.54N
Name of nearest waterbody: Gallina Arroyo
Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Rio Grande
Name of watershed or Hydrologic Unit Code (HUC): 13020201
☒ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
☐ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc…) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):
☒ Office (Desk) Determination. Date: **June 5, 2011 and January 25, 2013**
☒ Field Determination. Date(s): **May 25, 2011 and December 20, 2012**

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **Are no** "*navigable waters of the U.S.*" within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [*Required*]
☐ Waters subject to the ebb and flow of the tide.
☐ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
Explain: .

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There **Are no** "*waters of the U.S.*" within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [*Required*]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply): [1]
☐ TNWs, including territorial seas
☐ Wetlands adjacent to TNWs
☐ Relatively permanent waters[2] (RPWs) that flow directly or indirectly into TNWs
☐ Non-RPWs that flow directly or indirectly into TNWs
☐ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
☐ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
☐ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
☐ Impoundments of jurisdictional waters
☐ Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:
Non-wetland waters: linear feet: width (ft) and/or acres.
Wetlands: acres.

c. Limits (boundaries) of jurisdiction based on: **Pick List**
Elevation of established OHWM (if known): .

2. Non-regulated waters/wetlands (check if applicable):[3]
☒ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.
Explain: **Gallina Arroyo does not meet the significant nexus criteria.**

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[1] Boxes checked below shall be supported by completing the appropriate sections in Section III below.
[2] For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).
[3] Supporting documentation is presented in Section III.F.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. **TNW**
   Identify TNW: .

   Summarize rationale supporting determination: .

2. **Wetland adjacent to TNW**
   Summarize rationale supporting conclusion that wetland is "adjacent": .

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody[4] is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. **Characteristics of non-TNWs that flow directly or indirectly into TNW**

   (i) **General Area Conditions:**
   Watershed size: **50.4 square miles**
   Drainage area: **50.4 square miles**
   Average annual rainfall: **13.70 inches**
   Average annual snowfall: **17.4 inches**

   (ii) **Physical Characteristics:**
   (a) Relationship with TNW:
   ☐ Tributary flows directly into TNW.
   ☒ Tributary flows through **2** tributaries before entering TNW.

   Project waters are **20-25** river miles from TNW.
   Project waters are **5-10** river miles from RPW.
   Project waters are **15-20** aerial (straight) miles from TNW.
   Project waters are **2-5** aerial (straight) miles from RPW.
   Project waters cross or serve as state boundaries. Explain: .

   Identify flow route to TNW[5]: **Gallina Arroyo to San Marcos Arroyo to Galisteo Creek to Rio Grande (TNW).**
   Tributary stream order, if known: **2nd order.**

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[4] Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.
[5] Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

(b) General Tributary Characteristics (check all that apply):

Tributary is:
- ☒ Natural
- ☐ Artificial (man-made). Explain: .
- ☒ Manipulated (man-altered). Explain: **The property owner has removed vegetation, and graded and widened the channel.**

Tributary properties with respect to top of bank (estimate):
Average width: **54 feet**
Average depth: **0.5 feet**
Average side slopes: **3:1.**

Primary tributary substrate composition (check all that apply):
- ☐ Silts
- ☒ Sands
- ☐ Concrete
- ☐ Cobbles
- ☒ Gravel
- ☐ Muck
- ☐ Bedrock
- ☒ Vegetation. Type **scrub/shrub**/% cover: **est. 50-60%**
- ☐ Other. Explain: .

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: **Braided channel, appears stable due to vegetation.**
Presence of run/riffle/pool complexes. Explain: **None.**
Tributary geometry: **Meandering**
Tributary gradient (approximate average slope): **1.04 %**

(c) Flow:
Tributary provides for: **Ephemeral flow**
Estimate average number of flow events in review area/year: **1 event every 1.5 years**
Describe flow regime: **Flows only in response to storm events. Estimated rainfall event that will result in flow is at least 1.4 inches in a twenty-four hour period.**
Other information on duration and volume: **Flows are flashy and occur primarily during the monsoon season. The relatively low grade of the arroyo channel and the presence of high density vegetation within the channel is indicative of low flow velocities and a stable channel.**

Surface flow is: **Confined.** Characteristics: **Flows are ephemeral and the channel is braided.**

Subsurface flow: **Unknown**. Explain findings: .
- ☐ Dye (or other) test performed: .

Tributary has (check all that apply):
- ☒ Bed and banks
- ☒ OHWM[6] (check all indicators that apply):
  - ☐ clear, natural line impressed on the bank
  - ☐ changes in the character of soil
  - ☐ shelving
  - ☐ vegetation matted down, bent, or absent
  - ☐ leaf litter disturbed or washed away
  - ☐ sediment deposition
  - ☐ water staining
  - ☐ other (list):
  - ☐ the presence of litter and debris
  - ☒ destruction of terrestrial vegetation
  - ☐ the presence of wrack line
  - ☐ sediment sorting
  - ☒ scour
  - ☐ multiple observed or predicted flow events
  - ☐ abrupt change in plant community
- ☐ Discontinuous OHWM.[7] Explain: .

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):
- ☐ High Tide Line indicated by:
  - ☐ oil or scum line along shore objects
  - ☐ fine shell or debris deposits (foreshore)
  - ☐ physical markings/characteristics
  - ☐ tidal gauges
  - ☐ other (list):
- ☐ Mean High Water Mark indicated by:
  - ☐ survey to available datum;
  - ☐ physical markings;
  - ☐ vegetation lines/changes in vegetation types.

(iii) Chemical Characteristics:

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[6] A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.
[7] Ibid.

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).
Explain: **No water was present during site visits. Water would be expected to be turbid due to the flashy nature of storm flows.**
Identify specific pollutants, if known: **Sediment. No other known pollutants.**

(iv) Biological Characteristics. Channel supports (check all that apply):

☒ Riparian corridor. Characteristics (type, average width): **There is no riparian vegetation within the channel on the Smith property because it has been removed. Primary vegetation within the arroyo consists of mixed stands of upland and riparian scrub-shrub vegetation.**
☐ Wetland fringe. Characteristics: .
☐ Habitat for:
- ☐ Federally Listed species. Explain findings: .
- ☐ Fish/spawn areas. Explain findings: .
- ☐ Other environmentally-sensitive species. Explain findings: .
- ☐ Aquatic/wildlife diversity. Explain findings: .

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:
Properties:
Wetland size: acres
Wetland type. Explain: .
Wetland quality. Explain: .
Project wetlands cross or serve as state boundaries. Explain: .

(b) General Flow Relationship with Non-TNW:
Flow is: **Pick List**. Explain: .

Surface flow is: **Pick List**
Characteristics: .

Subsurface flow: **Pick List**. Explain findings: .
☐ Dye (or other) test performed: .

(c) Wetland Adjacency Determination with Non-TNW:
☐ Directly abutting
☐ Not directly abutting
- ☐ Discrete wetland hydrologic connection. Explain: .
- ☐ Ecological connection. Explain: .
- ☐ Separated by berm/barrier. Explain: .

(d) Proximity (Relationship) to TNW
Project wetlands are **Pick List** river miles from TNW. .
Project waters are **Pick List** aerial (straight) miles from TNW.
Flow is from: **Pick List.**
Estimate approximate location of wetland as within the **Pick List** floodplain.

(ii) Chemical Characteristics:
Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: .
Identify specific pollutants, if known: .

(iii) Biological Characteristics. Wetland supports (check all that apply):

☐ Riparian buffer. Characteristics (type, average width): .
☐ Vegetation type/percent cover. Explain: .
☐ Habitat for:
- ☐ Federally Listed species. Explain findings: .
- ☐ Fish/spawn areas. Explain findings: .
- ☐ Other environmentally-sensitive species. Explain findings: .
- ☐ Aquatic/wildlife diversity. Explain findings: .

3. Characteristics of all wetlands adjacent to the tributary (if any)
All wetland(s) being considered in the cumulative analysis: **Pick List**
Approximately ( ) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N)	Size (in acres)	Directly abuts? (Y/N)	Size (in acres)

Summarize overall biological, chemical and physical functions being performed: .

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D: .

2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: .

3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: .

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
   ☐ TNWs: linear feet width (ft), Or, acres.
   ☐ Wetlands adjacent to TNWs: acres.

2. **RPWs that flow directly or indirectly into TNWs.**
   ☐ Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial: .
   ☐ Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally: .

Provide estimates for jurisdictional waters in the review area (check all that apply):
- ☐ Tributary waters: linear feet width (ft).
- ☐ Other non-wetland waters: acres.
  Identify type(s) of waters: .

3. **Non-RPWs[8] that flow directly or indirectly into TNWs.**
☐ Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):
- ☐ Tributary waters: linear feet width (ft).
- ☐ Other non-wetland waters: acres.
  Identify type(s) of waters: .

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**
☐ Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
- ☐ Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .

- ☐ Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**
☐ Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisidictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**
☐ Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: acres.

7. **Impoundments of jurisdictional waters.[9]**
As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.
- ☐ Demonstrate that impoundment was created from "waters of the U.S.," or
- ☐ Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
- ☐ Demonstrate that water is isolated with a nexus to commerce (see E below).

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):[10]
- ☐ which are or could be used by interstate or foreign travelers for recreational or other purposes.
- ☐ from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- ☐ which are or could be used for industrial purposes by industries in interstate commerce.
- ☐ Interstate isolated waters. Explain: .
- ☐ Other factors. Explain: .

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[8] See Footnote # 3.
[9] To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.
[10] **Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA *Memorandum Regarding CWA Act Jurisdiction Following Rapanos.***

Identify water body and summarize rationale supporting determination: .

Provide estimates for jurisdictional waters in the review area (check all that apply):

☐ Tributary waters: linear feet width (ft).

☐ Other non-wetland waters: acres.

Identify type(s) of waters: .

☐ Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

☐ If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.

☐ Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.

☐ Prior to the Jan 2001 Supreme Court decision in "*SWANCC*," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).

☒ Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain:

The Smith Site is located on the Gallina Arroyo south of Santa Fe, New Mexico (see Attachment 1- Area Map). The Gallina Arroyo joins the San Marcos Arroyo approximately 1.7 miles downstream of the Smith Site. See Attachment 2 – Location Map and Attachment 3 - the Smith Site for details of the locations. The San Marcos Arroyo is also ephemeral. The San Marcos Arroyo joins Galisteo Creek, a seasonally intermittent stream, approximately 4 miles downstream from the confluence of the San Marcos and Gallina Arroyos. Galisteo Creek joins the Traditional Navigable Water (TNW) Rio Grande approximately 20 miles from the confluence of the Gallina Arroyo and the San Marcos Arroyo (see Attachment 4 – Significant Nexus Aerial Photograph).

The Gallina Arroyo flows only in response to rainfall. The Corps estimates that it takes a rainfall event of at least 1.4 inches in a twenty-four hour period to generate flow in the arroyo (8 cfs). This magnitude of flow occurs approximately once every 1.5 years. Furthermore, the Corps can infer from the amount of vegetation in the Gallina Arroyo that there is sufficient time between flows to allow vegetation to become established in the arroyo and that vegetation is not scoured out on a regular basis. Mr. Smith reported in his June 17, 2011 letter to the Corps that the purpose of the work he undertook within the Gallina Arroyo was to remove salt cedar trees and other dead trees that were clogging the area, to remove garbage that had accumulated over the years and to smooth out ruts that had formed. These activities indicate that the arroyo had not recently flowed at a rate sufficient to scour vegetation, garbage and ruts that had accumulated in the Gallina Arroyo on Mr. Smith's property.

The Gallina Arroyo floodplain consists of mixed stands of upland and riparian scrub-shrub vegetation. The U.S. Fish and Wildlife Service National Wetlands Inventory does not identify any wetlands within the Gallina Arroyo.

The Corps considered the chemical, physical and biological connections between the Gallina Arroyo and the Rio Grande in evaluating whether a significant nexus exists.

In evaluating a chemical connection, the Corps was unable to find any data or other information that could be used to establish a connection between the Gallina Arroyo and the Rio Grande. The New Mexico Environment Department's Surface Water Quality Bureau (NMED SWQB) is the primary agency responsible for ambient surface water quality monitoring, but generally does not collect water quality data from ephemeral waters. A review of the 2012-2014 State of New Mexico Clean Water Act Section 303(d)/305(b) Integrated Report prepared by NMED SWQB did not contain any water quality data for the Gallina Arroyo. A search of the Environmental Protection Agency's STORET database also did not contain any water quality data for the Gallina Arroyo, and an internet search for water quality data yielded no information.

In evaluating a biological connection, the Corps was unable to find any data or other information that could be used to establish a connection between the Gallina Arroyo and the Rio Grande. The Corps utilized the Albuquerque District Enterprise GIS Regulatory Viewer to determine if Critical Resource Waters have been identified in the Gallina Arroyo. None were identified. An internet search was also conducted and no information was found regarding biologic attributes of the Gallina Arroyo.

Regarding a physical connection, the Corps evaluated the likelihood of sediment transport from the Gallina Arroyo to the Rio Grande. An internet literature search did not reveal scientific data or analysis discussing sediment conveyance for the Gallina Arroyo. The record therefore does not support a physical connection.

Based upon the lack of evidence in the record of a physical, chemical or biological connection, a significant nexus with the TNW Rio Grande cannot be identified and the Gallina Arroyo is determined to be non-jurisdictional under Section 404 of the Clean Water Act.

See Additional Information in Section IV.B below.

☐ Other: (explain, if not covered above): .

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- ☐ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
- ☐ Lakes/ponds: acres.
- ☐ Other non-wetland waters: acres. List type of aquatic resource: .
- ☐ Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- ☐ Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
- ☐ Lakes/ponds: acres.
- ☐ Other non-wetland waters: acres. List type of aquatic resource: .
- ☐ Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

☐ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: .
☐ Data sheets prepared/submitted by or on behalf of the applicant/consultant.
  ☐ Office concurs with data sheets/delineation report.
  ☐ Office does not concur with data sheets/delineation report.
☐ Data sheets prepared by the Corps: .
☐ Corps navigable waters' study: .
☒ U.S. Geological Survey Hydrologic Atlas: .
  ☐ USGS NHD data.
  ☒ USGS 8 and 12 digit HUC maps. HUC 8: 13020201; Rio Grande-Santa Fe, New Mexico
☒ U.S. Geological Survey map(s). Cite scale & quad name:1:24K, NM-PICTURE ROCK.
☒ USDA Natural Resources Conservation Service Soil Survey. Citation:NCSS, Web Soil Survey, Santa Fe Area, New Mexico, Santa Fe County and Part of Rio Arriba County; and Santa Fe County Area, New Mexico, 05/31/11.
☒ National wetlands inventory map(s). Cite name:
Albuquerque District Enterprise GIS Regulatory Viewer – US Fish and Wildlife Service National Wetlands Inventory Map
☐ State/Local wetland inventory map(s): .
☐ FEMA/FIRM maps: .
☐ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)
☒ Photographs: ☒ Aerial (Name & Date): Santa Fe, NM area, NAIP; Google Earth, Santa Fe, NM area, 8/19/2012.
  or ☐ Other (Name & Date): .
☐ Previous determination(s). File no. and date of response letter: .
☐ Applicable/supporting case law: .
☐ Applicable/supporting scientific literature: .
☒ Other information (please specify):
John Baumgartel, adjacent property owner, Ground Photographs, May 2011
AMAFCA, Approved Jurisdictional Determination, Calabacillas Arroyo, SPA-2011-00386-ABQ
2012-2014 State of New Mexico Clean Water Act Section 303(d)/305(b) Integrated Report
  ftp://ftp.nmenv.state.nm.us/www/swqb/303d-305b/2012-2014/2012-2014USEPA-ApprovedNMReport.pdf
Environmental Protection Agency STORET Database
Albuquerque District Enterprise GIS Regulatory Viewer – Critical Resource Waters Map
Gallina Arroyo Rainfall-Runoff Values, Albuquerque District Hydrology and Hydraulics Section

B. ADDITIONAL COMMENTS TO SUPPORT JD:.
Subsequent to the Corps' issuance of its 2011 JD for the Gallina Arroyo, the Albuquerque District was involved in a JD appeal for the Calabacillas Arroyo (Bernalillo County, NM). The Calabacillas JD is relevant to the Gallina JD because both involved a determination of chemical nexus based on the likelihood that contaminants could be transported to the Rio Grande. In an appeal decision issued by the South Pacific Division (SPD) Administrative Appeal Review officer on November 8, 2012, the review officer found that the district used imprecise language in describing the chemical nexus to the Rio Grande and the chemical pollutant characteristics relied on for the Calabacillas JD did not support a significant nexus determination . The review officer thus remanded the Calabacillas JD back to the district to revise its analysis of chemical characteristics. Upon re-consideration the District concluded a chemical nexus to the Rio Grande was not supported. In light of the appeal officer's conclusions regarding the Calabacillas JD, the District determined it was appropriate to reconsider the Gallina Arroyo JD.

DECLARATION OF SERVICE

I hereby certify that on March 8, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of New Mexico by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

JENNIFER M. FRY

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